Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-1709

CLARK E. THOMAS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-1709

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vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

OPINIONS BELOW

The order of the Supreme Court of Florida denying Petitioner's Petition for Writ of Certiorari on March 13, 1978, is not reported. The order of the Fourth District Court of Appeal granting Respondent's motion to quash Petitioner's appeal as frivolous was entered on May 19, 1977 and is not reported. The order of the Circuit

Court of the Ninth Judicial Circuit denying Petitioner's Motion to Vacate is also unreported. These orders are contained in Petitioner's Appendix.

The order of the Florida Supreme Court denying Petitioner's Petition for Writ of Certiorari following the affirmance of his conviction on direct appeal is reported at 291 So.2d 11 (A 17)[1]. The decision of the Fourth District Court of Appeal affirming Petitioner's conviction is reported at 283 So.2d 909 (A 16).

The order of the United States District Court, Middle District of Florida, denying Petitioner's application for a Writ of Habeas Corpus is unreported but relevant portions of the order are excerpted and included in Respondent's Appendix (A 14, 15).

JURISDICTION

The order of the Supreme Court of Florida denying Petitioner's Petition for

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[1]"A" followed by an appropriate page number refers to the Appendix to Respondent's brief.

Certiorari was entered on March 13, 1978. The Petition for Writ of Certiorari was filed on or about May 24, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

QUESTION PRESENTED

Whether the decision of the state courts denying Petitioner's 3.850 Motion to Vacate because the matter raised therein had already been determined on direct appeal and was therefore res judicata and not raisable in the Motion to Vacate is an adequate state ground precluding this Court's review of Petitioner's double jeopardy claim on its merits; and if not, whether the retrial of Petitioner under the circumstances presented constituted double jeopardy in violation of the Fifth and Fourteenth Amendments?

CONSTITUTIONAL PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

Amendment V

No person shall be held to answer for

a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without the just compensation.

Amendment XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State

deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF THE STATE OF FLORIDA (1968)
Article One, Declaration of Rights, Section 9

No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against himself.

RULE INVOLVED

Rule 3.850, Florida Rules of Criminal Procedure (1976), which was the applicable rules at the time Petitioner filed his Motion to Vacate provides in pertinent part:

> . . . A prisoner in custody under sentence of a court established by the laws of Florida claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or of the State of Florida, or that the court was without jurisdiction to impose such sentence, or that

> the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack may move the court which imposed the sentence to vacate, set aside or correct the sentence . . .
>
> The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner . . .

STATEMENT OF THE CASE

Petitioner was charged in the Circuit Court for the Ninth Judicial Circuit, in and for Orange County, Florida on March 9, 1972, by indictment returned by a grand jury, with first degree murder in violation of Florida Statute 782.04.

Jury trial commenced with jury selection on July 17, 1972 and a twelve person jury was selected and sworn. The following day, July 18, 1972, the jury was discharged by the court because the court had heard the Florida Supreme Court had decided Donaldson v. Sack, 265 So.2d 499 (Fla. 1972) on July 17, 1972, and the holding of the case was the Circuit Court

no longer had jurisdiction in "capital" cases because the United States Supreme Court's decision in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 had invalidated Florida's death penalty statute.

Petitioner was then charged with first degree murder by an Information filed in the Criminal Court and after a six person jury trial, he was convicted as charged and sentenced to life imprisonment.

Petitioner filed a direct appeal from his conviction and one of the points argued in his appeal was that he was entitled to be discharged because double jeopardy attached when the trial court dismissed the twelve man circuit court jury (A 9-13). Following the affirmance of his conviction by the Court of Appeal (A 16), Petitioner filed a Petition for Certiorari in the Florida Supreme Court which was denied (A 17). Petitioner also raised his double jeopardy

claim in a Petition for Writ of Habeas Corpus in the Federal District Court, where his position was also rejected (A 14).

On December 19, 1975, Petitioner filed a Rule 3.850 Motion to Vacate, again asserting his claim of double jeopardy. The trial court denied the motion (Petitioner's Appendix 2-4), whereupon Petitioner filed a notice of appeal in the Fourth District Court of Appeal. Respondent filed a Motion to Quash Petitioner's appeal as frivolous because the double jeopardy issue had previously been considered and ruled upon on direct appeal (A 1-15). The court granted the Motion to Quash, and Petitioner then filed a Petition for Certiorari in the Florida Supreme Court, which was denied on March 13, 1978.

ARGUMENT

Petitioner contends that the Double Jeopardy Clause of the Fifth Amendment, as applied to the states through the

Fourteenth Amendment, barred his prosecution in the Criminal Division of the Florida courts after the circuit court jury was discharged. Respondent maintains that the state courts properly granted Respondent's Motion to Quash the Appeal without reconsidering Petitioner's Double Jeopardy claim on its merits because the issue had been raised and decided on direct appeal.

It is well settled that the United States Supreme Court's review of a federal claim which stems from a state court judgment that rests on independent and adequate state grounds is precluded. Fay v. Noia, 372 U.S. 391, 9 L.Ed.2d 837, 83 S.Ct. 822 (1963); N.A.A.C.P. v. Alabama, 357 U.S. 449, 2 L.Ed.2d 1488, 78 S.Ct. 1163 (1958). The purpose of this rule is to implement the policy that the United States Supreme Court review is intended to correct judgments, not to revise opinions; if the same judgment would be rendered by the

state court after the Supreme Court corrected its view of federal law, then the review would be nothing more than an advisory opinion. Herb v. Pitcairn, 324 U.S. 117, 89 L.Ed.2d 789, 65 S.Ct. 459 (1945).

In Parker v. North Carolina, 397 U.S. 790, 25 L.Ed.2d 785, 90 S.Ct. 1458 (1970) this Court held that where the state courts refused to consider the defendant's claim of racial exclusion in the composition of the grand jury because he had not challenged it at the proper time, this was an adequate state ground foreclosing Supreme Court review. Similarly, in Cousins v. Wigoda, 419 U.S. 477, 42 L.Ed.2d 595, 95 S.Ct. 541 (1975) the court held that where the state appellate court's judgment rejecting the defense of res judicata on the ground that it had not been pleaded and proved in the state trial court as required by state law constituted an adequate state ground that foreclosed any jurisdiction the

United States Supreme Court may possess to review the merits of the defense.

Applying the foregoing principles to the state courts' decision in the instant case, it is clear that the Petitioner is not entitled to this Court's consideration of his double jeopardy claim because his appeal was resolved on adequate state grounds by the courts below. Petitioner's double jeopardy claim was raised on direct appeal, and therefore under state law it was not a proper basis for collateral attack via a Motion to Vacate. Koedatich v. State, 287 So.2d 738 (3DCA Fla. 1974); Gore v. State, 260 So.2d 218 (1DCA Fla. 1972); Bright v. State, 257 So.2d 612 (3DCA Fla. 1972); Zide v. State, 253 So.2d 917 (3DCA Fla. 1971); State v. Bisendorfer, 244 So.2d 147 (4DCA Fla. 1971); Carter v. State, 242 So.2d 737 (1DCA Fla. 1970). The double jeopardy claim having been initially ruled on in Petitioner's direct appeal, was res judicata

at the time Petitioner raised it in his Motion to Vacate and therefore the state courts declined to reconsider the issue. Suarez v. State, 220 So.2d 442 (3DCA Fla. 1969); Culberson v. State, 224 So.2d 363 (2DCA Fla. 1969). Respondent submits therefore that this Court should decline to grant Petitioner's application for certiorari, because the Florida state courts have not decided a federal question of substance in a way not in accord with the applicable decisions of this Court, Rule 19(1)(a), Rules of the Supreme Court of the United States, rather they declined to review the double jeopardy claim on wholly independent and adequate state grounds.

Although it is Respondent's position that Petitioner is barred from consideration of his petition in its merits for the foregoing reasons, assuming arguendo that the court finds his petition should be considered on its merits, Respondent maintains the Petitioner was not placed

in jeopardy twice for the same offense in violation of the Fifth Amendment's proscription.

The transfer of Petitioner's case from the circuit court to the criminal court was occasioned by the United States Supreme Court's decision in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) which invalidated Florida's existing death penalty statute. The Furman decision was issued on June 29, 1972 and Petitioner's trial commenced on July 17, 1972. Before the trial, Petitioner had objected to the circuit court's jurisdiction, as all criminal offenses except capital crimes were tried in criminal court, and capital crimes were tried in circuit court. The fact of Petitioner's challenge to the court's jurisdiction was noted by the trial court (A 18-20). After the jury had been impaneled and sworn, the trial court learned of the Florida Supreme Court's decision in Donaldson v. Sack, 265 So.2d 499 (Fla. 1972)

which was issued on July 17, 1972. The opinion in Donaldson v. Sack stated that due to the Furman decision:

> . . . there seems to be no logical escape from the fact that our circuit courts at this time, and until any legislation which may revive "capital cases" do not have jurisdiction in those cases heretofore designated as "capital" and accordingly subsequent to Furman jurisdiction in such cases now pending or being filed vests in the courts of record and may be transferred there . . . Id. at 501.

The trial court concluded that the Donaldson v. Sack decision was dispositive of the issue of the circuit court's jurisdiction, discharged the jury, and ordered the case transferred to the criminal court. Petitioner's counsel did not object at the time to the trial court's action.

In an appeal from another murder case, Laster v. Stephenson, 268 So.2d 387 (2DCA Fla. 1972), the Second District Court of Appeal of Florida held that the circuit courts of Florida did have jurisdiction to try what were formerly "capital" cases

until July 24, the effective date of Donaldson v. Sack, 265 So.2d 499 (Fla. 1972). However, this decision is not controlling in Petitioner's case because it was the opinion of an intermediate court of appeal which is co-equal with the Fourth District Court of Appeal and factually the two cases are dissimilar. In Laster, the trial had been completed, resulting in the defendant's conviction on a lesser charge, and the circuit court proposed to have the case transferred to the criminal court for a retrial. In the instant case, the trial judge stopped the trial before any testimony was taken and transferred the case. As noted by the trial court sub judice, "Laster is merely an attempt by the intermediate appellate court to deal with a knotty problem on a piece-meal basis." (Petitioner's Appendix 3).

Although in discharging the first jury, the trial judge did not specifically use the word "mistrial" it is clear that a

mistrial was intended and the discharge of the jury was effectively a mistrial. The mistrial was ordered as a proper exercise of the trial court's discretion under the somewhat unusual circumstances of the instant case. The propriety of a mistrial order cannot be determined by a rigid formula. The court has set forth the general principles in Wade v. Hunter, 336 U.S. 684, 93 L.Ed. 974 (1949) that a trial can be discontinued when particular circumstances manifest a necessity for so doing and when failure to discontinue the trial would defeat the ends of justice. A trial court may order a mistrial if a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings. United States v. Jorn, 400 U.S. 470, 27 L.Ed.2d 543, 91 S.Ct. 547 (1971).

In the instant case, the trial court concluded that under the cases of

Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972) and Donaldson v. Sack, 265 So.2d 499 (1972) it had no choice but to abort the trial because it lacked jurisdiction to try the Petitioner. Respondent submits the situation in the instant case is similar to that presented in Illinois v. Somerville, 410 U.S. 458 35 L.Ed.2d 425, 93 S.Ct. 1066 (1973). In that case, there was a fatal defect in the indictment charging the defendant which could only be remedied by dismissing the indictment so a proper one could be filed. The court held that the trial court's declaration of a mistrial was proper because it implemented a reasonable state policy and the defendant's interest in proceeding to a verdict was outweighed by the competing, important demand for public justice.

This Court recently held in Arizona v. Washington, ____ U.S. ____, 54 L.Ed.2d 717, 98 S.Ct. ____ (1978) that the trial

court's decision to grant a mistrial should be accorded respect, and where the record demonstrates that he has acted deliberately and within "sound discretion" in declaring a mistrial, this is sufficient to show the "high degree" of necessity required. The trial court sub judice acted within its discretion in ordering the jury discharged and transferring the case to criminal court. Furthermore, at the time, Petitioner concurred with the trial court's action and in fact it was Petitioner who initially suggested that the Furman decision precluded the circuit court from trying the case (A 18-20). This Court held in its recent decision in United States v. Scott, 46 U.S. Law Week 4653 (June 14, 1978) that in a situation where termination of a trial was sought by the defendant on grounds unrelated to guilt or innocence before the case is submitted to the trier of fact for a verdict double jeopardy does not apply.

Similarly, in the instant case, Petitioner acquiesced in the termination of the first trial prior to any testimony being taken so no determination of guilt or innocence was made.

Since it is evident the mistrial was not occasioned by prosecutorial or judicial overreaching and the Petitioner in fact initially suggested the trial court's action, retrial of Petitioner in the criminal court was not barred by principles of double jeopardy. United States v. Dinitz, 424 U.S. 600, 47 L.Ed.2d 267, 96 S.Ct. 1075 (1976); United States v. Jorn, 400 U.S. 470, 27 L.Ed.2d 543, 91 S.Ct. 547 (1971).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

IN THE DISTRICT COURT OF APPEAL OF FLORIDA

FOURTH DISTRICT

LOUIS JOSEPH SPURLING and CLARK E. THOMAS, Appellants,	)	
v.	)	CASE NO. 76-683
STATE OF FLORIDA, Appellee.	)	

MOTION TO QUASH FRIVOLOUS APPEAL

Appellee, the State of Florida, by and through the undersigned counsel, respectfully requests that this Honorable Court quash the appeal in the above-styled cause. In support thereof, Appellee would show as follows:.

I

This is an appeal from the denial by the Criminal Division of the Circuit Court of the Ninth Judicial Circuit, In and For Orange County, Florida, of Appellant's Motion to Vacate, filed under Rule 3.850

of the Florida Rules of Criminal Procedure, Case No. 72-495.

II

Under the authority of Rule 3.9(b) of the Florida Appellate Rules, the above-styled cause should be quashed on the ground that the same is frivolous and therefore not properly before this Court.

III

It is Appellants' contention that the trial court erred in denying their Motion to Vacate made pursuant to Rule 3.850, Florida Rules of Criminal Procedure. It is Appellee's position that the trial court properly denied said motion, as the issue Appellants raised therein was previously ruled upon by this Court in Appellants' individual direct appeals before this Court. See Thomas v. State, 283 So.2d 909 (4DCA Fla. 1973), cert. denied, 291 So.2d 11 (Fla. 1974), and Spurling v. State, 282 So.2d 882 (4DCA Fla. 1973), cert. denied,

286 So.2d 11 (Fla. 1973). It is well established that points raised and disposed of on direct appeal cannot be the basis of a collateral attack via a motion to vacate. Koedatich v. State, 287 So.2d 738 (3DCA Fla. 1974); Gore v. State, 260 So.2d 218 (1DCA Fla. 1972); Bright v. State, 257 So.2d 612 (3DCA Fla. 1972); Zide v. State, 253 So.2d 917 (3DCA Fla. 1971); State v. Bisendorfer, 244 So.2d 147 (4DCA Fla. 1971); Carter v. State, 242 So.2d 737 (1DCA Fla. 1970).

IV

The sole issue Appellants presently bring before this Honorable Court for review is, in essence, whether Appellants were subjected to double jeopardy when they were charged on indictment in the Circuit Court with first degree murder and proceeded to have a twelve member jury selected, which was subsequently discharged, and Appellants were thereafter tried on the same charges by Information with a six

member jury in the Criminal Court of record. On direct appeal, each individual appellant, filing his own brief, presented the same issue to the Court. Attached and incorporated as Exhibits I and II respectively are conformed copies of the Assignment of Error and Argument relating to the point now raised for Appellants Thomas and Spurling respectively. As this Court has previously ruled on this issue for each appellant, Appellee contends that the previous determination and ruling made by this Court on this issue is res judicata. State v. Bisendorfer, supra.

Although Appellants have rephrased the issue presently before this Court from those which were initially determined on direct appeal, the doctrine of res judicata will nevertheless apply. It is judicially established that grounds raised from prior proceedings will be res judicata on subsequent points in collateral actions when the substance of the points is

identical. Suarez v. State, 220 So.2d 442 (3DCA Fla. 1969); Culberson v. State, 224 So.2d 363 (2DCA Fla. 1969). This "court should be spared the harassment of successive motions by the same prisoner containing repetitious grounds." Piehl v. State, 173 So.2d 723 (2DCA Fla. 1965); Riley v. State, 214 So.2d 767, 768 (2DCA Fla. 1968). Thus, it is Appellee's position that Appellants' instant issue should not be considered by this Court, and the instant appeal should be quashed. Grant v. State, 224 So.2d 721 (2DCA Fla. 1969).

V

Although Appellee realizes that a judicial ruling from a federal court is not binding on this Court, Appellee would show that the issue Appellants now raise was previously raised by Appellant Thomas in a federal Petition for Writ of Habeas Corpus. Said Petition was dismissed by order of the United States District Court,

Middle District of Florida, on January 15, 1975. Attached and incorporated as Exhibit III are conformed copies of Appellant's Petition and the Order of dismissal.

VI

Appellee files this motion in good faith and not for the purposes of harassment or undue delay in the timely disposition of the case sub judice.

WHEREFORE, in view of the foregoing discussion and authorities cited therein, Appellee respectfully requests this Honorable Court quash the appeal in the above-styled cause.

Respectfully submitted,

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/s/ Marsha G. Madorsky

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EXHIBIT 1

IN THE CRIMINAL COURT
OF RECORD IN AND FOR
ORANGE COUNTY, FLORIDA

STATE OF FLORIDA,
vs.
LOUIS JOSEPH SPURLING
and CLARK E. THOMAS,

NO. 72-879

ASSIGNMENTS OF ERROR

COMES NOW the Defendant, CLARK E. THOMAS, by and through his undersigned attorney, and files this his Assignments of Error:

1. That the verdict is contrary to the law.

2. That the verdict is contrary to the evidence.

* * *

15. That the Court erred in failing to discharge the Defendant as double jeopardy had attached due to the fact that previously in the Circuit Court, the jury had been sworn as to the Defendant, CLARK E. THOMAS, and

had been discharged which discharge was tantamount to an acquittal and Defendant should now be discharged.

* * *

POINT 1

1. WHETHER OR NOT THE TRIAL COURT ERRED IN FAILING TO DISCHARGE THE APPELLANT AFTER DOUBLE JEOPARDY HAD ATTACHED AT THE CONCLUSION OF THE CIRCUIT COURT CASE NO. 72-9 AFTER THE TRIAL JUDGE DISCHARGED THE SWORN AND IMPANELED JURY WITHOUT DECLARING A MISTRIAL.

ARGUMENT

1. THE TRIAL COURT ERRED IN FAILING TO DISCHARGE THE APPELLANT AFTER DOUBLE JEOPARDY HAD ATTACHED AT THE CONCLUSION OF THE CIRCUIT COURT CASE NO. 72-9 AFTER THE TRIAL JUDGE DISCHARGED THE SWORN AND IMPANELED JURY WITHOUT DECLARING A MISTRIAL.

Prior to the filing of this matter in the Criminal Court of Record in and for Orange County, Florida by direct Information, the Appellant had previously been indicted by the Orange County Grand Jury for the identical offense in the case of State v. Clark Thomas, Case No. 72-9, Orange County Circuit Court. Appellant was arraigned on March 10, 1972 (TM 1-4,

March 10, 1972) whereupon he entered a plea of not guilty. Thereafter, on July 17, 1972, the Circuit Court in and for Orange County, Florida, was convened and a jury was duly picked and sworn to try the Appellant for the first degree murder of Johnny Gentile. (R 233-234) On the following morning, July 18, 1972, the Court sua sponte determined that it did not have jurisdiction of the Appellant to try this matter whereupon this Court immediately ordered this case transferred to the Criminal Court of Record. (R 234) The Court released the jury (R 235) over the objection of the State (TM 21, July 17 and 18) without declaring a mistrial. (TM 26, 27, July 17 and 18)

From these aforementioned acts, Appellant would submit that former jeopardy had attached and Appellant's constitutional rights under the Fifth and Fourteenth Amendments of the United States Constitution

as well as Article 1, Section 9 of the Florida Constitution were violated by trying the Appellant for the same identical offense in the Criminal Court of Record for Orange County, Florida under Case No. 72-879.

In the landmark decision of Donaldson v. Sack, 265 So.2d 499, decided July 17, 1972, the Florida Supreme Court held that: "capital crimes" as previously known in Florida no longer existed, and that crimes previously included under this category would be tried by the various criminal courts of record. However, the opinion issued by the Florida Supreme Court on July 17, 1972, was clear in that Donaldson, supra, would not become final until July 24 at noon which was the latest time that a petition for re-hearing would be accepted by the Court.

In further clarifying the exact time when the Circuit Courts were divested of their power to try cases formerly cognizable

as "capital cases" the 2nd District Court of Appeals for the State of Florida in the case of Laster v. Stephenson, 268 So.2d 387 (2nd Dist. 1972) held that the Circuit Court properly had jurisdiction to try a first degree murder case on July 17, 1972 and that the Circuit Court's remand of the case on July 24 was premature.

It is well established that at any time a jury selected and sworn to try a criminal case, a discharge of the jury without the declaration of a mistrial, serves to discharge the defendant from further proceedings upon those identical charges. See State v. Lanier, 205 So.2d 671; State ex rel Hand v. Lane, 209 So.2d 873 (2nd District 1968).

Thus, the Honorable Claude E. Edwards, Judge of the Criminal Court of Record who had previously sat as the Judge of the Circuit Court in this matter erred in denying (R 89) Appellant's motion for discharge (R 30) as under the laws of the

State of Florida, the Appellant herein, Clark E. Thomas, was subject to immediate discharge after the release of the sworn jury in the Circuit Court case on July 18, 1972.

* * *

Exhibit II deleted

* * *

Exhibit III - Petition for Writ of Habeas Corpus deleted

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CLARK E. THOMAS,
#B-023775,

Petitioner,

vs.

No. 74-230-ORL-CIV-R

RAYMOND D MASSEY,
Superintendent,
Union Correctional
Institution,

Respondent.
_____/

O R D E R

This cause is before the Court on a petition for habeas corpus relief. Petitioner's claim for relief involves eight allegations.

The first allegation states that there was a violation of the fifth amendment protection against being placed in jeopardy twice for the same offense. Jeopardy does not attach until the accused is placed on trial in a court which has jurisdiction

to try the offense. United States v. Ball, 163 U.S. 662 (1896); United States v. Weissman, 434 F.2d 175 (8th Cir. 1970), cert. denied, 401 U.S. 982. The record shows that petitioner was not placed in jeopardy twice before a court that had jurisdiction to try the offense.

The second allegation . . .

* * *

For the foregoing reasons, it is

ORDERED that the petition for writ of habeas corpus is denied.

DONE AND ORDERED in Chambers at Orlando, Florida, this 15th day of January, 1975.

/s/ John A. Reed, Jr.
Judge

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA

FOURTH DISTRICT

JULY TERM 1973

CLARK E. THOMAS, Appellant,	)	
v.	)	CASE NO. 72-1054
STATE OF FLORIDA, Appellee.	)	

Decision filed September 25, 1973.

Appeal from the Criminal Court of Record for Orange County; Claude R. Edwards, Judge.

Richard W. Aschenbrenner of Law Offices of Fred A. Jones, Jr., Miami, for appellant.

Robert L. Shevin, Attorney General, Tallahassee Thomas M. Carney, Nelson E. Bailey and Basil Diamond, Assistant Attorneys General, West Palm Beach, for appellee.

PER CURIAM.

AFFIRMED.

OWEN, C.J., WALDEN and MAGER, JJ., concur.

SUPREME COURT OF FLORIDA

JANUARY TERM, A.D. 1974

FRIDAY, FEBRUARY 22, 1974

CLARKE E. THOMAS, Petitioner,	)	CASE NO. 44,672
vs.	)	DISTRICT COURT OF APPEAL, FOURTH
STATE OF FLORIDA, Respondent.	)	DISTRICT 72-1054

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

ROBERTS, Acting Chief Justice, ADKINS, BOYD, McCAIN and DEKLE, JJ., concur

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN
AND FOR ORANGE COUNTY,
ORLANDO, FLORIDA

CASE NUMBER 72-9

STATE OF FLORIDA,

Plaintiff,

vs.

CLARK E. THOMAS,

Defendant.
_____/

O R D E R

THIS CAUSE was pending in this Court on Grand Jury Indictment charging the defendant, CLARK E. THOMAS, with the crime of Murder in the First Degree and that said cause was set for trial by jury on July 17, 1972.

PRIOR to the commencement of the trial the defendant through his counsel made his objection to the jurisdiction of the Court based on a decision of the United States Supreme Court in Furman v. Georgia _____ U.S.

_____ (1972) and related cases pertaining to capital punishment and its effect on the jurisdiction of this Court to try capital cases.

THE COURT nevertheless proceeded to trial but on the 18th day of July, 1972, was advised of the opinion of the Supreme Court of Florida in Anthony Donalson v. Sack, filed July 17, 1972, by which it has been determined that the Circuit Court no longer has jurisdiction of the cause.

THE COURT thereupon discharged the Jury prior to the receipt of any evidence and directed in Open Court that the cause be transferred by the Clerk to the Criminal Court of Record of Orange County, Florida. The Court being otherwise advised in the premises, it is thereupon

ORDERED and ADJUDGED as follows:

1. That jurisdiction of the above entitled cause is vested in the Criminal

Court of Record of Orange County, Florida.

2. That the file in the cause, including all Pretrial Motions and Orders therein, Discovery Depositions and Witness Lists be and is hereby transferred to the Criminal Court of Record of Orange County, Florida.

/s/ Claude R. Edwards
JUDGE

CERTIFICATE OF SERVICE

I hereby certify that I furnished three (3) copies of the foregoing brief to counsel for Petitioner, Robert G. Murrell, Esquire, Post Office Box 1748, Orlando, Florida 32802, this _____ day of June, 1978.

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